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May 31, 2005

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: **Ex Parte Submission in MB Docket No. 05-89 (Implementation of
Section 207 of the Satellite Home Viewer Extension and
Reauthorization Act of 2004 Reciprocal Bargaining Obligations)**

Dear Ms. Dortch:

This submission addresses certain arguments set out in the Reply Comments of May 9, 2005 made by EchoStar Satellite L.L.C. ("EchoStar"), specifically, that refusal by broadcasters to grant retransmission consent for out-of-market carriage when a broadcaster is under contractual obligation to refuse consent violates the good faith negotiation requirements in Section 325(b)(3)(C) of the Communications Act of 1934 (the "Act").¹ MPAA strongly disagrees with EchoStar's arguments for the reasons set forth below and respectfully request that the Federal Communication Commission (the "Commission") refrain from reversing the clear protections for contractual limitations on retransmission consent for out-of-market carriage currently provided by the Act.

Implementation of a rule that would allow satellite operators to use the good faith requirement as a tool to force broadcast stations to breach agreements in order to grant retransmission consent in areas outside their designated market areas ("DMA") would impermissibly expand the scope of the statutory license created by 17 U.S.C. Section 119 to the prejudice of content providers including MPAA's member companies. Section 325(b)(3)(C) contains

¹ 47 U.S.C. 325(b)(3)(C) (as amended by Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA")).

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no provision allowing or authorizing the Commission to regulate agreements by broadcasters to withhold retransmission consent. To the contrary, Section 325(b)(6) provides clear protection to freely negotiated contractual agreements limiting retransmission consent outside a broadcaster's designated market area:

*Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of Title 17 or **as affecting existing or future video programming licensing agreements** between broadcasting stations and video programmers.*
47 U.S.C. Section 325(b)(6)(emphasis added)

In addition, the provisions of Section 325(b)(2)(B) demonstrate an intention of the legislator to accord priority to contractual limitations on out-of-market retransmissions. In that section, retransmission of superstations is not subject to retransmission consent under Section 325(b) so long as they are retransmitted under Section 119 of Title 17 and so long as the satellite carrier "complies with... syndicated exclusivity rules and sports blackout rules adopted ... under Section 339(b) of [title 47]." 47 U.S.C. Section 325(b)(2)(B). Such rules have been promulgated specifically to protect local broadcast agreements, including exclusive license provisions. A rule that could result in a finding that a broadcaster has failed to negotiate in good faith merely because of refusal to breach a contractual agreement with a content provider would render such exclusive license agreements meaningless.

Accordingly, the Commission should determine that it has no authority to abrogate contractual agreements between broadcasters and content providers, such as MPAA's member companies, concerning retransmission consent in a broadcaster's DMA. MPAA respectfully asks that the Commission therefore reject the arguments of EchoStar and decline to issue any rule that such a refusal violates the good faith bargaining requirement of Section 325.

In accordance with Section 1.1206 of the Commission's rules, one copy of this submission is being filed electronically.

Sincerely,

Jane Saunders

CC: By E-mail: Rick Chessen; Bill Johnson; Eric Sahl (EchoStar); Fritz Attaway (MPAA)
By Regular Mail: Catherine Bohigian; Stacy Fuller; Rudy Brioché; Jordan Goldstein